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No. 85-1251

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF TEXAS,

Petitioner,

v.

DANNY E. HILL, 47TH DISTRICT ATTORNEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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February 21, 1986

37pp

QUESTIONS PRESENTED*

1. Whether the Fifth Circuit should have allowed the State of Texas to reenter the case as a party, if the court did so allow, when the State, by and through its Attorney General, initially filed a Notice of Appeal and then withdrew the State's appeal of the district court's judgment?

2. Whether the State of Texas was a proper party-intervenor at the *en banc* appeal level?

3. Whether the State of Texas was a proper party-intervenor at the trial court level and, thus, entitled to participate in the proceedings before the district court and on appeal?

4. Whether the Attorney General has waived any right to challenge Hill's status as a defendant and appellant in this action?

5. Whether this case must be dismissed for failure to join the true party defendant?

6. Whether, irrespective of the Fifth Circuit's approval of Hill's motion to intervene and be substituted as the class representative on appeal, as an existing party-defendant and defendant-class member, Hill had the right and ability to file a Notice of Appeal and carry forward the appeal for and on behalf of himself and the defendant-class (i) when the class representatives appointed by the district court failed to give the class members notice that they would not appeal on behalf of the class, or (ii) when the defendant-class is not given notice and the opportunity to object to a settlement by the State of Texas resulting in a contemplated dismissal of the appeal?

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*In accordance with S.Ct. Rule 21.1(b), Hill notes that all parties to the Fifth Circuit judgment sought to be reviewed are: Donald F. Baker, appellee, and Danny E. Hill, appellant. The State of Texas sought leave to intervene after previously withdrawing the State's appeal, but formal action was never taken by the Fifth Circuit on that request. The Texas Attorney General has assumed that the State is an intervenor and taken the liberty of re-styling this case before the Court.

In compliance with S.Ct. Rule 21.1(e)(iii), Hill's counsel certifies that he received the State's Petition on January 24, 1986.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	10
I. THE FIFTH CIRCUIT ERRED IN PERMITTING THE ATTORNEY GENERAL TO REENTER THE CASE ON HEARING *EN BANC*	10
A. The Attorney General of Texas Voluntarily Withdrew The State's Appeal and Ceased To Be a Party	10
B. The State has Judicially Admitted Its Withdrawal and Refusal to Participate in The Appeal of this Case	11
C. The Fifth Circuit's Implicit Permission Allowing the State to Intervene as a Party, or Participate as An Amicus Curiae, at the *En Banc* Level Was Improper and Untimely After the State Voluntarily Withdrew Its Appeal and Ceased to be an Appellant	11
D. If It is Found That the Fifth Circuit Implicitly Granted the Attorney General's Request to Intervene on *En Banc* Appeal, Such Implicit Grant Was Erroneous	12
1. Section 2403(b) Intervention	13
2. Permissive Intervention	18

Page

E. The Attorney General's "Real Party in Interest" Claims are Misplaced Under Rule 17 and Have Been Waived Under Rule 9. The Fifth Circuit Should Have Dismissed the Attorney General from the Case 20

II. THE ATTORNEY GENERAL WAS NOT EVEN A PROPER PARTY-INTERVENOR AT THE TRIAL COURT LEVEL, AND THE FIFTH CIRCUIT SHOULD HAVE DENIED THE ATTORNEY GENERAL'S PARTICIPATION ON THAT GROUND 22

A. Section 2403(b) Intervention 22

B. Other Intervention 24

III. THE FIFTH CIRCUIT ERRED IN FAILING TO RECOGNIZE HILL'S STANDING AS A PARTY-DEFENDANT AND MEMBER OF THE DEFENDANT-CLASS AND, THUS, HIS RIGHT TO APPEAL SOLELY ON THE BASIS OF HIS STATUS AS A DEFENDANT IRRESPECTIVE OF HIS STATUS AS THE CLASS REPRESENTATIVE . 24

A. Inadequate Representation of Class Due to Failure to Appeal 25

B. Inadequate Representation of the Class Due to Failure To Give the Class Notice of Settlement. 26

CONCLUSION 27

CERTIFICATE OF SERVICE 28

TABLE OF AUTHORITIES

CASES:

	Page
Baker v. Wade, 743 F.2d 236 (5th Cir. 1984)	*passim*
Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) (*en banc*)	*passim*
Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex.1982)	*passim*
Baker v. Wade, 106 F.R.D. 526 (N.D. Tex. 1985)..	*passim*
Brewer v. Republic Steel Corp., 513 F.2d 1222 (6th Cir. 1975)	19
Cisneros v. Corpus Christi I.S.D., 560 F.2d 190 (5th Cir.), cert. denied, 434 U.S. 1075 (1977)	19
Davis v. Griffin—Spalding City, Georgia Board of Educ., 445 F. Supp. 1048 (N.D.Ga. 1975).....	21
Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir. 1970)	19
Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976)	8
E. Brooke Matclack, Inc. v. Walrath, 24 F.R.D. 263 (D. Md. 1959)	21
Ex parte Tracey, 93 S.W. 538 (Tex. Crim. App. 1905).....	14
Garcia v. Laughlin, 155 Tex. 261, 285 S.W.2d 191 (1955)	14
Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973)..	25
Greenfield v. Villager Industries, Inc. 483 F.2d 824 (3d Cir. 1974).....	26
Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975)	26

	Page
Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940)	25
In Re Four Seasons Securities Law Litigation, 502 F.2d 834 (10th Cir. 1974)	26
Ivey v. Daus, 181 F. Supp. 793 (S.D.N.Y. 1960)	21
Jones v. Caddo Parish School Board, 735 F.2d 923 (5th Cir. 1984)	19
Klein v. Henry S. Miller Residential Services, Inc., 82 F.R.D. 6 (N.D. Tex. 1978)	25
Landry v. Two R. Drilling Co., 511 F.2d 138 (5th Cir. 1975)	21
Marks v. Brucker, 434 F.2d 897 (9th Cir. 1970)	21
Maryland Casualty Co. v. Rutherford, 36 F.2d 226 (5th Cir. 1929)	14
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950)	27
New York v. Uplinger, 104 S.Ct. 2332 (1984)	17
Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967)	19
Payne v. Travenol Laboratories, Inc., 673 F.2d 798 (5th Cir. 1982)	26
Petrol Stops Nw. v. Continental Oil Co., 647 F.2d 1005 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981)	19
Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978)	25
Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), *amended in part on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042	22

	Page
Sagers v. Yellow Freight Systems, Inc., 68 F.R.D. 686 (N.D. Ga. 1975)	26
Simer v. Rios, 661 F.2d 655 (7th Cir. 1981)	26
Smolowe v. Delendo Corporation, F.Supp. 790 (S.D.N.Y. 1940)	17
Sovereign News Co. v. Falke, 448 F. Supp. 306 (N.D. Ohio 1977), *remanded on other grounds*, 610 F.2d 428 (6th Cir. 1979), *further remanded on other grounds*, 674 F.2d 484 (6th Cir. 1982)	16
Spangler v. Pasadena City Boar[illegible] of Educ., 552 F.2d 1326 (9th Cir. 1977)	19
Spielman Motor Co. v. Dodge, 295 U.S. 89 (1935).	14,15
Spring v. Caldwell, 92 F.R.D. 7 (S.D. Tex. 1981), *rev'd on other grounds*, 692 F.2d 994 (5th Cir. 1982)	16
State v. Gary, 163 Tex. 565, 359 S.W.2d 456 (1962)	14
Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921)	25
Vietnamese Fishermen's Assn. v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982)	17
Yett v. Cook, 281 S.W. 837 (Tex. 1926)	14
TEXAS CONSTITUTION:	
Tex. Const. art. 5, § 21	2,14
FEDERAL STATUTES:	
28 U.S.C. § 2403(b)	*passim*
28 U.S.C. § 1254(1)	2
Judicial Code § 266, 28 U.S.C. § 380	15

	Page
TEXAS STATUTES:	
Texas Penal Code § 21.01	2
Texas Penal Code § 21.06	*passim*
Texas Penal Code § 38.02	16
Tex. Code Crim. Proc. Ann. art. 2.01, 2.02 (Supp. 1982)	3,14
Tex. Rev. Civ. Stat. Ann. arts. 4330-4413(202)	14
RULES OF THE SUPREME COURT OF THE UNITED STATES:	
Rule 19.5	2
Rule 20.5	2
FEDERAL RULES OF PROCEDURE:	
Fed. R. Civ. P. 9	20,21
Fed. R. Civ. P. 17(a)	20
Fed. R. Civ. P. 17(b)	20,21,22
Fed. R. Civ. P. 17(c)	20
Fed. R. Civ. P. 23(b)	3
Fed. R. Civ. P. 23(e)	26
Fed. R. Civ. P. 24	18,19,24
Fed. R. App. P. 32(a)	11
MISCELLANEOUS:	
6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1541 (1978)	20
17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4235, at 401-02 (1978)	16
3A J. MOORE, MOORE'S FEDERAL PRACTICE § 17.07 (1985)	20
S. Rep. No. 94-204, 94th Cong., 2d Sess. 5 (1975)	14
Three Judge Court Act, Pub. Law 94-381	14

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STATE OF TEXAS,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This Cross-Petition seeks review of the decision of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, which is reported at 769 F.2d 289, and reprinted as Baker Appendix A, only upon the condition that the Petition for Certiorari is granted in either No. 85-1251 or No. 85-1225.[1] The supplemental

[1]There are two Petitions for Writ of Certiorari pending before the Court with respect to the Fifth Circuit's *en banc* decision reported at 768 F.2d 289. Action No. 82-1251, the instant Petition, was filed by the State of Texas against Danny E. Hill. A similar and companion Petition for Writ of Certiorari was filed by the Plaintiff, Donald F. Baker, against Henry Wade, et al. and is referenced as No. 82-1225. Because counsel for Petitioner, Donald F. Baker, failed to properly serve the true

(Footnote continued on following page)

opinion of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, denying Appellant's Petition for Rehearing En Banc is reprinted as Baker Appendix F. The original decision of the Fifth Circuit panel is reported at 743 F.2d 236 and reprinted as Baker Appendix E. The memorandum opinion of the United States District Court for the Northern District of Texas, Dallas Division, (Buchmeyer, J.) is reported at 553 F.Supp. 1121 and reprinted as Baker Appendix B. The final judgment of the District Court entered on September 30, 1982 is reprinted as Baker Appendix C. A supplemental opinion of the District Court is reported at 106 F.R.D. 526 and reprinted as Baker Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, sitting *en banc*, was entered on August 26, 1985. A Petition for Rehearing was denied on October 23, 1985. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). The jurisdiction of this Court to hear Respondent's Cross-Petition is invoked under Rules 19.5 and 20.5 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Constitutional Provisions

Texas Constitution art. 5, § 21 is reproduced at App. 11.

B. Statutes

28 U.S.C. § 2403(b) is reproduced at App. 10.

Texas Penal Code §§ 21.01 and 21.06 are reproduced at App. 8 and 9 respectively.

(Footnote continued from previous page)
Respondent in Action No. 85-1225, a Cross-Petition and Response to that Petition for Certiorari will be due at a later date.

For the convenience of the Court and parties, references to the "Baker Appendix" refer to the Petition for Certiorari in No. 85-1225.

Texas Code of Criminal Procedure art. 2.01 is reproduced at App. 12.

STATEMENT OF THE CASE

This Cross-Petition involves the rights of the defendant-class and individual defendant-class members to bring meritorious appeals of adverse judgments of district courts in their individual behalf and on behalf of the defendant-class if the class representatives refuse to appeal or the appeal is compromised by a third-party who is not a member of the defendant-class.

A homosexual, Donald F. Baker, sued a defendant-class consisting of all district, county and city attorneys in the State of Texas and sought a declaration that § 21.06 of the Texas Penal Code violated his right of privacy, the Equal Protection Clause and the Establishment of Religion Clause of the First Amendment. The trial court certified the defendant-class pursuant to Fed. R. Civ. P. 23(b)(2) (R. Vol. I at 204-205). Henry Wade, District Attorney for Dallas County, and Lee Holt, then City Attorney for the City of Dallas, were made class representatives. (R. Vol. I at 204-5). The State of Texas filed a four-page response to a notice of the suit (R. Vol. I at 79-82), but did not intervene to take an active role in the defense of the statute. (Affidavit of Joseph G. Werner; App. 1).

The Texas Attorney General was designated as an "associate" counsel on behalf of the defendant-class; however, Assistant City Attorney Joseph G. Werner was designated as the "lead class counsel for the defendant-class." (R. Vol. I at 204).[2] The State, by and through the Attorney General, prior to the District Court's memorandum opinion, filed only one pleading: "Response of the

[2]The State, by and through the Attorney General, did not actively participate in the defense of the statute at either the trial court level or the Fifth Circuit. The cross-examination of witnesses by the defendant class was accomplished almost entirely by the Assistant City Attorney, Joe Werner.

State of Texas"—July 9, 1980 (R. Vol. I at 79 - 82)."[3] The State, by and through the Attorney General, did not participate in the filing of any pre-trial motions; did not conduct any discovery; did not offer any trial testimony; did not actively, if at all, participate in the trial; did not participate in trial strategy for the defendant-class; and, after initially filing a notice of appeal, withdrew the appeal of the State.[4] Although the class representatives for the defendant class offered evidence at trial and examined witnesses, the State, by and through the Attorney General, was noticeably silent. (R. Vol. VII, 1 - 283 (Transcript of Proceedings)).

The trial court issued its memorandum opinion on August 17, 1982. After discovery and a hearing on plaintiff's attorneys fees in which it was discovered that the Texas Human Rights Foundation, and not the plaintiff, was the real party-plaintiff in interest in this suit, the trial court entered its final judgment on September 30, 1982.[5] The final judgment of the district court declared that § 21.06 of the Texas Penal Code was in violation of the constitutionally protected right of privacy and equal protection.

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[3]The response was filed only on behalf of the State of Texas; not the defendant-class. The State of Texas has never filed a pleading seeking to defend the defendant-class selected by the plaintiff. The Attorney General has done little or nothing to defend the constitutionality of § 21.06 and has consistently objected to and interferred with Hill's representation of the defendant-class.

[4]Nothing in the record indicates that the Attorney General ever purported to voluntarily represent the interest of the defendant-class. The Attorney General's action in withdrawing his appeal was done solely on behalf of the State, not on behalf of the individual defendant-class members or the defendant-class itself. The confusion which the Attorney General has created is a result of his failure to recognize that his own pleadings and admissions before the various courts that have heard this suit confirm that at no time did the Attorney General give any representation to the defendant-class. Hill is the only representative of the class.

[5]At the attorneys fee hearing following the court's memorandum opinion, the plaintiff's counsel, James Barber, admitted that: "We were initially contacted by a non-profit corporation called the Texas Human Rights Foundation about litigating this issue, and we did enter into a contract with them. . . ." (R. Vol. VI at 48).

The district court permanently enjoined the enforcement of § 21.06 and expressly made the judgment binding on "the named defendants Muncy and Wade, as well as on the members of the class certified by this Court" (R. Vol. IV at 808). The trial court further expressly stated that "such defendants (Muncy and Wade) and all class members are permanently enjoined from enforcing the statute." (R. Vol. IV at 808).[6]

The district court's final judgment directly impaired and prejudiced Hill's legal power as a state official to enforce criminal laws. Hill's interest and his impairment of that interest by the district court's judgment "cannot be questioned." *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985)(*en banc*).

The designated class representatives, Henry Wade and Analeslie Muncy (substituted for Lee Holt), refused to appeal the district court's adverse judgment against the defendant-class. No reason or excuse for the class representatives' failure to appeal has ever been offered.[7] Neither class representative, Wade or Muncy, gave any member of the defendant class notice of either (i) the district court's final judgment and memorandum opinion, or (ii) the class representatives' decision not to appeal on behalf of the defendant-class. Nevertheless, on October 28, 1982, Hill filed a timely Notice of Appeal. On November 1, 1982, the same date

[6]The Original Complaint filed by the plaintiff did not include a request for injunctive relief against the individual defendant-class members or the defendant-class, (R. Vol. I at 1 - 6), and the plaintiff admits in his Petition for Writ of Certiorari to this Court that no injunctive relief was requested. Petition for Certiorari No. 85-1225, at 4 n.4. There is no indication in the record that the individual defendant-class members were ever given notice that the plaintiff was seeking an injunction against them in their official capacities. Nevertheless, the District Court enjoined the individual defendant-class members from enforcing § 21.06.

[7]It is a matter of common knowledge that the City of Dallas, Texas, with the possible exception of Houston, Texas, has the largest homosexual population of any city in the State. The class representatives' failure to appeal is probably more attuned to political motivations than a zeal to defend the class.

as the Texas general election and the last day on which a Notice of Appeal could be filed on behalf of the State, Mark White, then Attorney General, filed a Notice of Appeal on behalf of the State.[8]

On November 1, 1982, Jim Mattox was elected as the new Attorney General for Texas. Without notice to any member of the entire defendant-class (except Hill), on March 9, 1983, Mr. Mattox informed the Fifth Circuit by letter that he was withdrawing the State's Notice of Appeal.[9] (App. 2).

On March 18, 1983, the Attorney General formally filed a Motion to Withdraw the State's Appeal in this case.[10] (App. 3) On April 12, 1983, shortly after the Texas Supreme Court's denial of a writ of mandamus to the Attorney General to pursue the appeal on behalf of the State, Hill filed a motion in the district court to intervene and be substituted as the class representative. As a precaution, on July 5, 1983, Hill filed a motion to intervene and be substituted as class representative in the Fifth Circuit. On

[8]The Attorney General's Notice of Appeal was filed only on behalf of the State of Texas; not on behalf of the individual defendant-class members or the defendant-class.

[9]In the Attorney General's letter to the Fifth Circuit, he acknowledged that Hill was an appellant and that the Fifth Circuit should "be hearing directly from his office as to his intentions with respect to a continuation of the appeal on behalf of his office."

[10]The Motion to Withdraw was made only on behalf of the State. There is no indication in the Motion to Withdraw that the Attorney General was withdrawing the appeal on behalf of the defendant-class members or the defendant-class. In fact, the Attorney General acknowledged Hill as a party by certifying a Certificate of Service to him on the Motion to Withdraw.

Shortly after Mr. Mattox withdrew the State's appeal, Hill and several other interested parties filed a mandamus action in the Supreme Court of Texas to compel the Attorney General to pursue the appeal to the Fifth Circuit and follow his sworn duty to uphold the laws of the State.

In the Attorney General's response to the mandamus action against him, he stated to the Texas Supreme Court that: "Petitioner Hill has already filed a timely notice of appeal in the Fifth Circuit of the very decision they seek to have appealed." The Texas Supreme Court denied the writ of mandamus against the Attorney General.

August 16, 1983, the Fifth Circuit granted Hill's motion to intervene and be substituted as the class representative. (App. 4). The Fifth Circuit's Order that Hill be granted leave to intervene and be substituted as the class representative was not overruled by the panel's decision and was affirmed by the *en banc* court. Neither the State nor Baker[11] have petitioned this Court for review of the Fifth Circuit's order substituting Hill as the class representative. Hill, as he stands before this Court, is the class representative of the original defendant-class.

On April 3, 1984, approximately two weeks prior to the oral argument before the Fifth Circuit panel, the district court denied Hill's motion to intervene and wrote an extensive supplemental opinion. On April 17, 1984, Hill and Baker orally argued the case before a panel of the Fifth Circuit. Neither the Attorney General nor the State participated in the oral argument or briefing to the Fifth Circuit panel.

On September 21, 1984, the Fifth Circuit panel dismissed Hill's appeal. The panel opinion totally ignored Hill's standing as a party, as a member of the defendant class that had been enjoined, and as the class representative on appeal. The panel failed to discuss or analyze under what circumstances a member of a defendant-class can bring a meritorious appeal of an adverse judgment against the class when the class representatives fail to appeal. Instead, the panel decision focused entirely upon the "propriety of Hill's intervention." The panel erroneously presumed that the Attorney General was an adequate representative of the interest of the State. The panel analyzed Hill's position as if he were a totally unrelated third-party to the proceeding.

On October 10, 1984, Hill filed a Petition for Rehearing En Banc and a Petition for Rehearing Before the Panel. On January 28, 1985, Hill's Petition for Rehearing En Banc was granted by the Fifth Circuit. On February 20, 1985, the State filed a letter

[11]Petitioner in No. 85-1225.

with the Fifth Circuit requesting permission to re-intervene in the case as a party as a matter of right or to appear as amicus curiae. (App. 5).

On March 4, 1985, the Fifth Circuit ordered that in view of the fact that the Attorney General had once intervened in the case and then dismissed his appeal, he was directed to file a brief which "shall include a resume of the procedural history of the case and address the question of whether the State now has a right to intervene in an appeal in which the State's Attorney General once dismissed." (App. 6).[12]

On March 29, 1985, the Attorney General filed a Brief of the State of Texas on Rehearing En Banc. At the oral argument on June 17, 1985, the Attorney General was permitted to argue against the appeal of Hill and in favor of Baker. On August 26, 1985, the *en banc* Fifth Circuit determined that Hill had standing to appeal the judgment of the district court. A majority of nine of the sixteen judges on the *en banc* court opined that Hill's standing to appeal was valid. Judge Rubin, joined by six other judges, opined that Hill's appeal should be dismissed.

The *en banc* court went on to review the district court's judgment on the merits and concluded that this Court's summary affirmance in *Doe v. Commonwealth's Attorney,* 425 U.S. 901 (1976), was binding on the lower courts and that the lower courts should "refuse to speculate" about what this Court may do on this issue today.[13] Judge Goldberg wrote a separate dissenting opinion

[12]The Attorney General was also ordered to address the constitutionality of the statute and the authority of the Attorney General to represent the State in the case. There have been no further orders by the Fifth Circuit with respect to the Attorney General's letter of February 20, 1985 or the Attorney General's participation in the case.

[13]The *en banc* court went on to hold that homosexuals do not constitute a suspect or quasi-suspect class and that, therefore, the standard of review is whether §21.06 is rationally related to a legitimate State end. 769 F.2d at 292-93. The court held that in view of the strong objection to

(Footnote continued on next page)

with respect to the right of privacy and equal protection issues. None of his fellow six dissenters joined Judge Goldberg in his dissent on the merits. Of the sixteen judges that reviewed the merits of Baker's claim, only one saw fit expressly to reject the *en banc* court's holding that §21.06 met all challenges and was constitutional.

On September 9, 1985, Baker filed a Petition for Rehearing En Banc. On October 23, 1985, the *en banc* court denied Baker's Petition for Rehearing En Banc. The Court noted that "nine of the sixteen participating judges joined in [the decision that Hill was entitled to intervene and pursue the appeal]. Seven judges dissented on the procedural ground that Hill was not entitled to intervene and prosecute the appeal. [However], only one dissenting judge wrote further to say that if he were to reach the merits, he would hold the Texas statute unconstitutional." (Baker Appendix at 135a).[14]

The plaintiff, the State, the Attorney General, and the Fifth Circuit panel all failed to realize that Hill does not now, and has never, purported to represent the State. Hill has consistently asserted his due process right to appeal an adverse judgment against him in his individual capacity as a district attorney and member of the defendant-class, and, now, as the representative of the defendant-class on appeal. The Petitioners mislead this Court by implying that Hill has attempted to represent the State of Texas. He has not. Hill only desires to represent his interest as a member of the defendant-class and, equally, the interest of the defendant-

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(Footnote continued from previous page)
homosexual conduct which has prevailed in Western culture for the past seven centuries, §21.06 was a valid exercise of State powers and, consequently, constitutional. 769 F.2d at 292.

[14]In response to the emotional pleas of the plaintiff, the *en banc* court explained that "it is simply not the business of this Court to act upon [the moral judgment of the State of Texas as a rational basis for the statute] . . . [and that the plaintiff's complaints are] directed to the wrong audience." (Baker Appendix at 135 - 36a).

class as a whole. The State, if it was ever truly a party to this action, is separate and distinct from Hill and the defendant-class.

REASONS FOR GRANTING THE CROSS-PETITION WRIT

Respondent requests that the Court grant the Cross-Petition Writ only in the event that the Court grants the State's Petition for Writ of Certiorari.

I.

THE FIFTH CIRCUIT ERRED IN PERMITTING THE ATTORNEY GENERAL TO REENTER THE CASE ON HEARING *EN BANC*.

A. The Attorney General of Texas Voluntarily Withdrew The State's Appeal and Ceased To Be a Party.

By letter dated March 9, 1983 (App. 2), the Attorney General withdrew the State's appeal in this case. In that letter, the Attorney General acknowledged the appeal of Hill and referred the court to Mr. Hill's office to determine his intentions to continue his pursuit of the appeal. Thereafter, on March 18, 1983, the Attorney General filed a formal Motion to Dismiss the appeal on behalf of the State. (App. 3). The State's voluntary withdrawal estops the State from later participating in the same case. The State should not be allowed to vacillate in and out of cases at the whim of the Attorney General. The State, in its brief to the Fifth Circuit pursuant to the court's Order of March 4, 1985, failed to cite any statutory or case authority which permits the State to withdraw from a case and then re-intervene either as a matter of right or discretion. The Fifth Circuit erred in permitting the State to re-intervene either as a party or as an amicus curiae after having voluntarily withdrawn the State's appeal.[15]

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[15]It is unclear from the record whether or not the Fifth Circuit allowed the State to re-intervene as a party or to participate merely as an amicus curiae, if either. Judge Clark's order of March 29, 1985 required the

(Footnote continued on next page)

B. The State Has Judicially Admitted Its Withdrawal and Refusal to Participate in The Appeal of this Case.

In response to a mandamus action, the Attorney General judicially admitted to the Texas Supreme Court that the State was not, and did not intend to be, a party to this action. *Baker*, 769 F.2d at 291. The Attorney General further judicially admitted the standing of Hill to appeal this case. *Id.* Thereafter, the Attorney General took a totally inconsistent position on Hill's standing before the *en banc* Fifth Circuit Court. The judicial inconsistencies of the Attorney General's position with respect to both (i) Hill's standing, and (ii) the Attorney General's desire to prosecute the appeal for the State judicially estops the Attorney General from taking a totally inconsistent position before this Court. The Attorney General has further judicially admitted that the State was not an appellant before the *en banc* court by filing the Brief of the State of Texas on Rehearing En Banc with a *green* brief cover.[16]

C. The Fifth Circuit's Implicit Permission Allowing the State to Intervene as a Party, or Participate as An Amicus Curiae, at the *En Banc* Level Was Improper and Untimely After the State Voluntarily Withdrew Its Appeal and Ceased to be an Appellant.

By letter dated February 20, 1985, the State, by and through the Attorney General, requested that the State be permitted to intervene as a party as a matter of right, or to intervene as a party

(Footnote continued from previous page)
State to establish the authority for the State's re-intervention. The State never filed a formal motion to intervene or to participate as an amicus curiae in the *en banc* argument. There was no formal order entered by the Fifth Circuit with respect to the State's participation in the *en banc* hearing. The State would have no grounds to bring a Petition for Writ of Certiorari to this Court if the State were not a party below, and Hill maintains that the State never gained party-intervenor status at the *en banc* level and thus cannot properly appear before this Court.

[16]Federal Rule of Appellate Procedure 32(a) provides that "the cover of the brief of an intervenor or amicus [shall be] green."

pursuant to "42 [sic] U.S.C. §2403(b)," or for leave to appear as an amicus curiae. (App. 5). The Fifth Circuit ordered the State to file a brief establishing the authority of the State to reenter the case at this stage of the proceedings. No subsequent order was entered by the Fifth Circuit allowing the State to (i) intervene as a party as a matter of right; (ii) intervene pursuant to 28 U.S.C. §2403(b); or (iii) appear as an amicus curiae. Nevertheless, the State was allowed to participate in the oral argument and to file a brief opposing Hill's appeal. The silence of the Fifth Circuit with respect to the request of the State may implicitly mean that the request of the State was granted. If so, Hill urges the Court to reverse that implicit finding because of a total lack of authority for a party to (i) intervene in an action, (ii) affirmatively and voluntarily withdraw from that action, and (iii) then reenter the case at a subsequent appellate level. There is no authority for such actions by the State, and the Fifth Circuit's implied permission, if any, was improper.

D. If It is Found That the Fifth Circuit Implicitly Granted the Attorney General's Request to Intervene on *En Banc* Appeal, Such Implicit Grant Was Erroneous.

As stated above, Hill maintains that the Attorney General and the State were never granted leave to intervene at the *en banc* appellate level under any statute or rule and that the Attorney General's posture at that level was, at most, that of a would-be amicus curiae. If this Court should determine, however, that the Fifth Circuit implicitly granted the Attorney General's request to intervene, then Hill asserts that such implicit grant was erroneous and must be reversed by this Court.

In response to the Fifth Circuit's March 4, 1985, Order (App. 6), the Attorney General submitted his March 29, 1985, "Brief of the State of Texas on Rehearing En Banc" (hereinafter the "State's Brief"), in which he requested permission to intervene under 28 U.S.C. §2403(b), State's Brief at 11-13, or, alternatively,

under a theory of "permissive intervention" without citation of any authorities therefor, *id.* at 13. Under either § 2403(b) or any permissive intervention rule, intervention by the Attorney General at the *en banc* appellate stage of this case was improper and constitutes reversible error.

1. *Section 2403(b) Intervention.* In addition to the waiver, estoppel, laches, and admission arguments against the Attorney General's intervention at the *en banc* stage addressed above, Hill maintains that this case does not satisfy the facial requirements of § 2403(b) or the case law requisites established by this Court and lower courts for § 2403(b) intervention.

Section 2403(b) states:

> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence . . . and for argument on the question of constitutionality.

The first facial requirement failed by the Attorney General is that the action be one to which *no* officer or employee of the State is already a party. Obviously, the plaintiff sued by name the District Attorney of Dallas County and the Dallas City Attorney; he also sued the class of all District, County, and City Attorneys in Texas. Under the Texas constitution and statutes, all of these positions constitute "state officers."

Hill and the defendant-class consist of officers charged with enforcing the criminal laws of the State. *Baker v. Wade*, 743 F.2d at 241 n.21 (panel opinion). The *en banc* opinion itself expressly holds that Hill is "a proper official under Texas law to represent the state," "a state official," and "the state officer." 769 F.2d at 291, 292. The Texas constitution provides that all district and

county attorneys "shall represent the State" in all cases in their district and county. Tex. Const. art. 5, § 21. Likewise, district attorneys and county attorneys "shall represent the State in all criminal cases" in their respective courts and in all appeals therefrom. Tex. Code Crim. Proc. Ann. art. 2.01, 2.02 (Supp. 1982). Finally, the Texas Supreme Court has held that the district attorney is the "proper representative of the State" in certain actions in which the remedy "belongs to the state . . . to protect the interests of the people as a whole," *State v. Gary*, 163 Tex. 565, 359 S.W.2d 456, 458 (1962), and that in such actions the attorney general does not have power to act, *Garcia v. Laughlin*, 155 Tex. 261, 285 S.W.2d 191, 195 (1955). *See also Maryland Casualty Co. v. Rutherford*, 36 F.2d 226 (5th Cir. 1929); *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926); *Ex parte Tracey*, 93 S.W. 538, 540 (Tex. Crim. App. 1905); Tex. Rev. Civ. Stat. Ann. arts. 4330-4413(202). Indeed, Baker himself has admitted that at the trial court level, "the State felt that its interest was adequately represented by the Dallas City and District Attorney's offices," Appellee's Supplemental Brief on Rehearing En Banc at 4. This is obviously an admission that these two named defendants were state officers representing state interests.

The legislative history of, and the federal court cases interpreting, § 2403(b) confirm these state authorities regarding the nature of the original defendants herein as state officers, thus precluding intervention by the Attorney General. The 1976 amendments to the Three Judge Court Act, Pub. Law 94-381, added § 2403(b) to Title 28 of the United States Code. As stated, the statute applies only in a federal action in which no agency, officer, or employee of the State is already a party, and the legislative history of § 2403(b) confirms this conclusion.

The Senate Report on Pub. Law 94-381 defines "state officer" as "local officers performing a State function that embodies a policy of statewide concern." S. Rep. No. 94-204, 94th Cong., 2d Sess. 5 (1975), *citing Spielman Motor Co. v. Dodge*, 295 U.S. 89

(1935). In *Spielman*, the plaintiff sued a district attorney in New York and sought to enjoin the district attorney from instituting a criminal misdemeanor prosecution against the plaintiff for violation of the New York "Code of Fair Competition for the Motor Vehicle Retailing Trade." 295 U.S. at 91. The plaintiff claimed the statute was unconstitutional under the Fourteenth Amendment due process clause. 295 U.S. at 91. The plaintiff's application for an interlocutory injunction was heard in the district court by three judges pursuant to the Judicial Code § 266. 28 U.S.C. § 380. The Court questioned whether § 266 had any application if the defendant was not a "state officer," and if so, whether the Court had jurisdiction to hear the direct appeal. 295 U.S. at 91.

The Court adopted a two-prong test to determine if the defendant is a "state officer": (1) what is the nature of the legislative action assailed; and (2) what is the function of the officer who is sought to be restrained. 295 U.S. at 94. The first prong is satisfied if the statute is "of general application" or of statewide concern. 295 U.S. at 94. The second prong is met if the officer is charged with the "duty of enforcing the statute in the interests of the state and not simply in the interest of the locality where he serves." 295 U.S. at 94. The Court held that the district attorney was an officer of the state and, thus, that the case was properly heard under § 266. 295 U.S. at 95.

It is undisputed that § 21.06 is of "general application" and of statewide effect. *Baker*, 743 F.2d at 242. If it were not, the plaintiff would not have sued *all* district, county, and city attorneys, but only those in whose jurisdiction § 21.06 applied. The first prong of the *Spielman* test is met.

Second, Hill and the defendant-class consist of officers charged with enforcing the criminal laws of the State, as demonstrated by the above-cited Texas authorities. The second prong of *Spielman* is met. Recent federal cases confirm that state prosecuting attorneys are "state officers" for purposes of § 2403(b) and that, there-

fore, the state attorney general may not intervene. In *Sovereign News Co. v. Falke*, 448 F. Supp. 306 (N.D. Ohio 1977), *remanded on other grounds*, 610 F.2d 428 (6th Cir. 1979), *further remanded on other grounds*, 674 F.2d 484 (6th Cir. 1982), a plaintiff sued several county prosecuting attorneys and city police officers in Ohio seeking a declaratory judgment that the state criminal obscenity statute was unconstitutional and an injunction against its enforcement. The court reviewed the language and legislative history of § 2403(b) and concluded that the Ohio attorney general could not be invited to intervene because the defendant county attorneys were state officers. Therefore, the court lacked the power to permit the attorney general to intervene under § 2403(b). 448 F. Supp. at 314 n.13. *See also* 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4235, at 401-02 (1978).

Similarly, in *Spring v. Caldwell*, 92 F.R.D. 7 (S.D. Tex. 1981), *rev'd on other grounds*, 692 F.2d 994 (5th Cir. 1982), Texas Penal Code § 38.02 was challenged as unconstitutional. The Houston Chief of Police was one of the original named defendants. The Texas attorney general moved to intervene under 2403(b), but the court held that under both Texas and federal law a police chief and police officers were "state officers." 92 F.R.D. at 9. Since these state officers were parties to the suit, notice to the Attorney General was not required under § 2403(b), and the Attorney General was not entitled to intervene. 92 F.R.D. at 9-10.

Thus, under both federal and state law, the original defendants and defendant-class herein were "state officers". Likewise, Hill, a "state officer," as a defendant class member, an appellant, the class representative on appeal, and an intervenor on appeal, was clearly a party to the action at the *en banc* appellate stage when the Attorney General requested permission to intervene under § 2403(b). Accordingly, the Attorney General has failed to meet the first facial prerequisite of § 2403(b), and any allowed intervention by the Fifth Circuit was erroneous.

Similarly, the Attorney General did not meet the second facial requirement of § 2403(b) that the State be permitted "to intervene . . . for argument *on the question of constitutionality*" at the *en banc* appellate level. Indeed, the federal case law interpreting the requirement of this portion of § 2403(b) holds that the Attorney General has a right to intervene *only* to offer arguments and evidence *in support of* the constitutionality of § 21.06. *Vietnamese Fishermen's Assn. v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 215 n.17 (S.D. Tex. 1982), *citing Smolowe v. Delendo Corporation*, 36 F.Supp. 790, 792 (S.D.N.Y. 1940). *See also New York v. Uplinger*, 104 S.Ct. 2332, 2333 n.1 (1984) (Court considers relevant a state Attorney General's views on "*the constitutionality* of a statute with state-wide application"). Consequently, any action of the Attorney General other than addressing, affirming, and defending the constitutionality of § 21.06 would be null and void and could not serve as grounds for intervention on appeal under § 2403(b).

The Attorney General has repeatedly disavowed, both explicitly and implicitly, any intention to address or support the constitutionality of § 21.06 before the Fifth Circuit and this Court. In response to the Attorney General's February 20, 1985, letter to the Fifth Circuit requesting intervention at the *en banc* stage (App. 5), Hill's counsel telephoned the Attorney General's counsel, who admitted that he sought to intervene only to address the issue of Hill carrying forward the appeal and that he would not address the constitutionality of § 21.06. *See* February 25, 1985, Letter of Hill's Counsel to Fifth Circuit (App. 7). Moreover, the State's Brief, at 11, specifically states that the State sought intervention on appeal only "to defend his (the Attorney General's) exclusive right to represent the State's interests before this Court." The State's brief studiously avoids addressing the constitutionality of § 21.06, even though the Fifth Circuit's March 4, 1985 order explicitly required the Attorney General to brief that issue. Indeed, the Attorney General's instant Petition to this Court itself fails to

deal with the issue of the constitutionality of §21.06. Of course, the outcome of the Attorney General's prolonged effort in this case to preclude Hill from exercising his proper rights and powers of appeal, if it were successful, would be not to support the constitutionality of §21.06 but to acquiesce in the trial court's finding of its unconstitutionality.

For all of these reasons, the Attorney General failed to meet any of the prerequisites of §2403(b) intervention at the *en banc* appellate stage of this case, and the Fifth Circuit should have expressly denied his request to intervene in this appeal and refused to accept or consider any written or oral arguments from him.

2. *Permissive Intervention.* The only arguable method available to the Attorney General for his requested "permissive intervention" at the *en banc* appellate stage, other than §2403(b), would be pursuant to Rule 24(b) and (c), Fed. R. Civ. P., although neither his February 20, 1985, letter nor his March 29, 1985, brief to the Fifth Circuit cites or relies on this rule for his requested intervention. Consequently, he has waived any ability, and is estopped, to claim such grounds for intervention. Nevertheless, if this Court finds that the Fifth Circuit impliedly granted the Attorney General permissive intervention at the *en banc* level under Rule 24(b) and (c), such grant was improper and constitutes reversible error.

Under Rule 24(b) and (c), an application for permissive intervention must be timely, the applicant's claim must have a question of law or fact in common with the main action, the intervention must not prejudice the rights of the existing parties, and the applicant must file and serve a formal motion to intervene stating the grounds therefor and being accompanied by a specific pleading.

In the case at bar, the Attorney General could meet none of these requirements. His "application," if any, was certainly not timely after having dropped the State's own appeal two years

earlier and having failed to request intervention at the panel appellate stage. If an applicant was in a position to seek intervention at an earlier stage in this case and he failed to do so, his later application should be denied. *See Jones v. Caddo Parish School Board*, 735 F.2d 923 (5th Cir. 1984); *Petrol Stops Nw. v. Continental Oil Co.*, 647 F.2d 1005 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir. 1970).

Similarly, to allow intervention at the final *en banc* and Supreme Court levels would certainly prejudice the rights of Hill. If intervention would unduly expand the controversy or lead to extra expense or delay, the application should be denied. *See Cisneros v. Corpus Christi I.S.D.*, 560 F.2d 190 (5th Cir.), *cert. denied*, 434 U.S. 1075 (1977); *Brewer v. Republic Steel Corp.*, 513 F.2d 1222 (6th Cir. 1975); *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967). Allowance of the Attorney General's putative intervention herein has both expanded the controversy and caused extra expense, as witness the fact that Hill must presently prepare and file two separate Cross-Petitions and two Briefs in Opposition to this Court instead of only one of each.

Finally, the appellate record herein clearly demonstrates that the Attorney General at the *en banc* level filed no formal motion to intervene accompanied by any specific pleading "stating the grounds therefor" on the permissive intervention issue, nor was any formal order ever entered on the informal intervention request. Failure to comply strictly with Rule 24(c)'s conditions for intervention should result in denial of the intervention request. *See Spangler v. Pasadena City Board of Educ.*, 552 F.2d 1326 (9th Cir. 1977).

Thus, the Attorney General failed to meet any of the requirements for permissive intervention or §2403(b) intervention, and he should not have been allowed to participate at the *en banc* level

of this action. The Fifth Circuit's allowance of such participation was erroneous, and this Court should reverse on this issue and formally dismiss the Attorney General from this case.

E. The Attorney General's "Real Party in Interest" Claims are Misplaced Under Rule 17 and Have Been Waived Under Rule 9. The Fifth Circuit Should Have Dismissed the Attorney General from the Case.

The Attorney General claims before this Court that the State is "the real party in interest" in this case, Petition at 18, an assertion also made to the Fifth Circuit *en banc*. State's Brief at 5, 7. The Attorney General has confused the concepts of "real party in interest" and "capacity to be sued," and his reasoning is premised upon an inappropriate understanding of the "real party in interest" doctrine. The appropriate theory to be applied in the present case is the concept of "capacity to be sued."

There is an important distinction to be drawn between these two concepts.

> As used in Rule 17(a), the real party in interest principle is a means to identify the person who possesses *the right sought to be enforced*. Therefore, the term directs attention to whether *plaintiff* has a significant interest in the particular action he has instituted. By way of contrast, capacity is conceived to be a party's personal right to litigate in a federal court. The issue is determined under Rule 17(b) and Rule 17(c) for all parties to the suit and is neither limited to plaintiffs, *as is the real party in interest concept*, nor dependent on the character of a specific claim involved in the litigation.

6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1541 (1978)(emphasis added). *Accord*, 3A J. MOORE, MOORE'S FEDERAL PRACTICE § 17.07 (1985). Although, as the commentators point out, other courts have also confused the concept of real party in interest in connection with other defendants, the real party in interest rule applies only to plaintiffs, not to defendants.

The significance of this distinction is not mere semantics. Under Rule 9, Fed. R. Civ. P., when a party desires to challenge the capacity of another party to sue or be sued, he must do so by specific negative averment, and failure to do so at the trial court level constitutes a waiver of any right to later challenge the capacity of a party to participate in a lawsuit. *Landry v. Two R. Drilling Co.*, 511 F.2d 138 (5th Cir. 1975); *Marks v. Brucker*, 434 F.2d 897 (9th Cir. 1970); *E. Brooke Matclack, Inc. v. Walrath*, 24 F.R.D. 263 (D.Md. 1959); *Ivey v. Daus*, 181 F. Supp. 793 (S.D.N.Y. 1960); *Davis v. Griffin-Spalding City, Georgia Board of Educ.*, 445 F. Supp. 1048 (N.D.Ga. 1975). Since the Attorney General claims that he was a valid party intervenor at the trial court level, *see* Petition at 4, any objection to the defendant class' or to Hill's capacity to be sued must have been raised by the Attorney General at trial. He did not. The record reflects that the Attorney General made no objection or claim before the trial court that he was the "real party in interest."

Waiver is a particularly appropriate result in the present action since the Attorney General did not raise this issue until after the plaintiff had obtained a judgment against Hill and after the panel decision of the Fifth Circuit. Now the Attorney General seeks to deprive Hill of the opportunity to present the substantive errors upon which this judgment was based to any court. Because prior to judgment, the Attorney General failed to object or negatively aver that Hill was an improper party, the Attorney General has waived that right. Moreover, since the appropriate issue to be resolved is whether the class of which Hill is a member had the capacity to defend the instant action, and since no challenge was made at the trial court level concerning the class' capacity, this issue has been waived by the Attorney General and may not be raised now.

Alternatively, if the State or the Attorney General is the true party defendant, then the case should have been dismissed under Rule 17(b), Fed. R. Civ. P. This suit was initiated by the plaintiff,

not Hill. The plaintiff chose the forum for the suit, its theory, the procedure, whom the defendants would be, and the defendants' representatives. Hill, in his capacity as a district attorney, was one of the defendants the plaintiff chose to sue. The Attorney General now argues that the initial defendants were not the real parties in interest; the real party in interest was actually the State. However, the plaintiff did not sue the State, he sued Hill, and the judgment enjoins Hill, not the State.

The plaintiff chose his opposition, but now he and the Attorney General want a party not sued to be the exclusive spokesman for the defendants. If the plaintiff wanted the Attorney General or the State to be a defendant, or wanted the Attorney General to be the sole representative for the defendant-class, he should have sued the Attorney General. *See Ruiz v. Estelle*, 679 F.2d 1115, 1137 (5th Cir. 1982), *amended in part on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042. If the Attorney General is truly the spokesman for the defendant-class and if the State is truly the real party in interest, then the plaintiff's failure to make the Attorney General or the State a party is a fatal flaw in this suit under Rule 17(b). Thus, the case should be dismissed because the State, a non-party, not the defendants, is the real defendant, Fed. R. Civ. P. 17(b). The *en banc* Fifth Circuit's failure to reverse and dismiss the action on this ground constitutes reversible error, and this Court should itself dismiss the suit for this reason.

II.

THE ATTORNEY GENERAL WAS NOT EVEN A PROPER PARTY-INTERVENOR AT THE TRIAL COURT LEVEL, AND THE FIFTH CIRCUIT SHOULD HAVE DENIED THE ATTORNEY GENERAL'S PARTICIPATION ON THAT GROUND.

A. Section 2403(b) Intervention.

Hill argued to the *en banc* appellate court that since the Attorney General's original attempted intervention at the trial court

level was improper, he had no standing to represent the interests of either the State or the true defendant-class at trial or on appeal. The Fifth Circuit did not expressly rule on this point, and Hill maintains that this Court should uphold him on this issue, dismiss the Attorney General's Petition, and find that the Attorney General has no standing to appear in this case at all.

The State and the Attorney General did not properly intervene and never became a party pursuant to § 2403(b) at the trial level because the defendants, all district, county and city attorneys in Texas, are officers of the State and because the Attorney General did not actively participate "in the presentation of evidence . . . and for argument" in support of § 21.06.

The § 2403(b) requisite of no other state officer being a party to the action and the status of the defendants herein as "state officers" have been addressed above in section I.D.1 hereof. The Attorney General did not meet this requirement at the trial level.

The second requisite of actively presenting evidence and argument in support of the statute's constitutionality at the trial level was not met by the Attorney General either. The record reflects that the trial court, by its order of June 3, 1980, notified the Attorney General of the pendency of this action and granted him leave to intervene under § 2403(b). (R. Vol. I at 60) The Attorney General subsequently filed a four-page "Response of the State of Texas" on July 9, 1980 (R. 79), but took virtually no action after that date (Affidavit of Assistant City Attorney Joseph G. Werner, App. 1), except to file a notice of appeal (R. Vol. IV at 874-75) and later, a motion to withdraw appeal. With the exception of filing the four-page "Response," the Attorney General did absolutely nothing to defend the constitutionality of § 21.06. The Attorney General did not participate in the filing of any pre-trial motions; did not conduct any discovery; did not offer any trial testimony; did not actively, if at all, participate in the trial; and did not participate in trial strategy for the defendant-class. (Affidavit

of Joseph G. Werner, App. 1). In fact, the Record indicates that although the City and District Attorneys for Dallas offered evidence at trial and examined witnesses, the Attorney General was silent. (R. Vol.VII at 1-283)

In the face of this record, it cannot possibly be asserted that the Attorney General met the second prerequisite for § 2403(b) intervention at the trial level.

B. Other Intervention.

The Attorney General made no attempt at the trial level to intervene under any statute or rule other than § 2403(b). Thus, he has now waived any claim to intervention under Rule 24(a),(b), or (c) or under any other theory. Moreover, as explained above in Section I.D.2 hereof, the Attorney General could not possibly meet the Rule 24 intervention requirements, even at the trial level.

Accordingly, this Court should find that the Attorney General was never a proper intervenor at any stage of this case and has no standing to appear before this Court.

III.

THE FIFTH CIRCUIT ERRED IN FAILING TO RECOGNIZE HILL'S STANDING AS A PARTY-DEFENDANT AND MEMBER OF THE DEFENDANT-CLASS AND, THUS, HIS RIGHT TO APPEAL SOLELY ON THE BASIS OF HIS STATUS AS A DEFENDANT IRRESPECTIVE OF HIS STATUS AS THE CLASS REPRESENTATIVE.

The *en banc* decision of the Fifth Circuit clearly holds that Hill's intervention as the new class representative gives him standing to pursue the appeal both as the class representative and as an individual member of the defendant-class. It is unclear whether the court considered Hill's standing as a class member apart from his intervention and substitution. Hill has standing not

only as the class representative, but, equally, as an individual defendant enjoined by an action of a federal district court. Because of the inadequate representation to the class due to the original class representatives' failure to appeal, Hill, in addition to his standing as the new class representative, has standing to appeal as a member of the defendant-class.

A. Inadequate Representation of Class Due to Failure to Appeal.

It has long been established that:

> The requirement that absent parties be adequately represented is essential to the notion that class judgment binds absent class members; without this protection, binding absent members would deprive these parties of due process of law. *E.g.*, *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921).

Klein v. Henry S. Miller Residential Services, Inc., 82 F.R.D. 6, 8 (N.D. Tex. 1978). Thus, a judgment in a class action will not bind the absent members of the class where there has been inadequate representation by either the class representative or class counsel. *See, e.g.*, *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973) (inadequate representation of class by class representative); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978) (inadequate representation of class by class counsel). The *Gonzales* court stressed throughout its opinion that "it was the class representative's duty to appeal the lower court's judgment and thus it was the *class representative* who inadequately represented the class." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d at 1177 (emphasis in original). Because the due process rights of the class members are affected by the class representative's decision not to appeal, the decision cannot rest entirely with either the named class members or the class counsel. *Pettway v. American Cast Iron*, 576 F.2d at 1177.

B. Inadequate Representation of the Class Due to Failure To Give the Class Notice of Settlement.

If the Attorney General was the true representative of the interest of the class and all of the Appellants, *and if*, as Baker admitted in his brief (Brief for Appellee Before the Panel at 19) and at oral argument, a settlement was reached between him and the Attorney General which led to the dismissal of the appeal, then the Attorney General had a duty to provide each of the class members with notice of the settlement *and* submit the agreement for approval of the court. The Attorney General did neither. Federal Rule of Civil Procedure 23(e) states that: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs." There is no question that the provisions of Rule 23(e) are mandatory and serve to invalidate a settlement where absent members of the class are not notified of the agreement. *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982); *Sagers v. Yellow Freight Systems, Inc.*, 68 F.R.D. 686 (N.D. Ga. 1975). Effective notice to unnamed class members is a prerequisite of adequate representation and constitutional due process. *Sagers v. Yellow Freight Systems*, 68 F.R.D. at 689-90. *See also Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975); *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3d Cir. 1974); *In Re Four Seasons Securities Law Litigation*, 502 F.2d 834 (10th Cir. 1974).

A class settlement agreement reached without notice to class members violates the due process rights of the members. Therefore, since "notice of the settlement is necessary as a matter of constitutional due process [and] an individual's claim cannot be extinguished without notice and opportunity to be heard," the settlement entered into between the Attorney General and Baker does not have a *res judicata* effect as to Hill, and he, as a class member, is entitled to be heard on appeal. *Simer v. Rios*, 661 F.2d

655, 664 (7th Cir. 1981) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14, 70 S. Ct. 652, 655-57, 94 L.Ed. 865 (1950)).

Thus, to the extent that the Fifth Circuit failed to recognize and consider Hill's standing to appeal as a party-defendant irrespective of his status as the new class representative, the Fifth Circuit erred in that respect because the original class representatives, as a matter of law, gave the class inadequate representation on appeal.

CONCLUSION

For these reasons, Respondent's Cross-Petition for Writ of Certiorari should be granted, but only if the Petition for Writ of Certiorari is granted in Actions No. 85-1251 or No. 85-1225.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing have been mailed, by Certified Mail, Return Receipt Requested, to the attorneys of record listed below on this 21st day of February, 1986.

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